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No. 92-1643

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

FELICE LIPPERT,
Petitioner,

v.

DELTA AIR LINES, INC., and
THE WACKENHUT CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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REPLY BRIEF FOR PETITIONER

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The petition showed that the Florida Supreme Court erroneously decided a question of federal law by misconstruing language in an airline tariff as preempting airlines' full liability under state law for a passenger's property lost at the airline's airport security checkpoint. Respondents do not dispute that this ruling will effectively apply throughout the Nation, and throughout the industry, because of the essentially identical tariffs that govern other airlines' terms of carriage. Indeed, they insist on the importance of a uniform answer to this liability question. Br. in Opp. 16. Nor do they dispute that the problem of lost property at security checkpoints is a widespread one (although the amounts at issue rarely can be expected to warrant litigation against a major airline). To the contrary, respondents themselves trumpet the importance of the ruling below by alleging (albeit without support) that

airlines would suffer a serious economic impact if left subject to normal state-law rules of liability for negligent operation of security checkpoints. Br. in Opp. 13-15. They acknowledge, moreover, that the only other judicial decision directly on point reached a result contrary to that of the Florida Supreme Court. *Id.* at 6 n.6.

The brief in opposition focuses, instead, on trying to defend the Florida Supreme Court decision on the merits. Respondents' arguments, however, nowhere answer our central points: (1) the tariff provision at issue—applying to "baggage, or other property (including carry-on baggage, if tendered into the custody of [the airline])"; "baggage or other property (whether checked or otherwise delivered in to the custody of [the airline]" (set out at Pet. 3)—cannot cover the security checkpoint unless, as the Florida Supreme Court held, it applies *whenever* an airline takes custody of a ticketed passenger's bags, for whatever purpose; (2) that reading must be incorrect, as it would render meaningless the tariff provision extending the liability limit to a specific type of custody (for temporary storage before or after a flight) and would produce absurd results; and (3) in any event, any lack of clarity in the tariff provision must, as a matter of settled federal law, be resolved against the airline (as drafter of the tariff), against limitations of liability, and against preemption of state liability. *See* Pet. 11-17. Each of respondents' arguments sidesteps this straightforward analysis.[1]

Most tellingly, respondents nowhere even attempt to explain how the Florida Supreme Court's reading of the

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[1] Respondents attempt at several places to reargue their responsibility for the lost property (*e.g.*, Br. in Opp. 3-4, 12), but this argument addresses the wrong forum. The case comes to this Court on the explicit finding of a jury that respondents were negligent and were liable for the loss under state law, a finding affirmed by the Florida Supreme Court. Pet. App. 9a. The question, therefore, is whether the normal damages flowing from that state-law liability are federally preempted.

tariff provision at issue can stand without rendering the temporary-storage provision superfluous. If the provision at issue limits liability for any airline custody of passenger property, then it was pointless to add the provision extending the liability limit to airline custody of passenger property for temporary storage, much less to restrict that provision to custody before or after a flight. Similarly, although respondents speak to the absurd results produced by that reading (Br. in Opp. 10), all that they say is the opinion below does not by its terms embrace such results: they offer not a word to explain how it is possible to construe the tariff provision as the Florida Supreme Court did and yet avoid those results. Respondents do not even propose a narrower reading of the critical tariff language—"tendered" or "delivered" into "the custody" of the airline—that could support the judgment below and yet make sense of the language, avoid absurd results, and comport with the temporary-storage provision.

In fact, there is no such reading. The only coherent alternative to the Florida Supreme Court's reading is construing the tariff provision to apply only when the airline takes custody for the airline's own custodial transportation of the property. That is not what occurs when the airline takes brief custody at a security checkpoint with the intent to return the property to the passenger for her to transport the item herself as a carry-on.

Respondents simply miss this elementary point. They say that "[t]he relinquishment of property to ensure that it is suitable for transport is no different from a mandated, last minute relinquishment of property which routinely occurs on board an airline," as when a bag is "too big to fit under the seat or in the overhead bin and therefore . . . is relinquished for placement in the cargo hold." Br. in Opp. 12. The critical difference, of course, is that in the latter situation the property *is* given into the airline's custody for the airline (rather than the passenger) to care for during transportation; this situation is expressly covered by the tariff provision. At the se-

curity checkpoint, by contrast, the airline takes custody only to return the item to the individual, regardless of whether that individual is a passenger at all, whether that item is going on the airplane, or whether the item (if it is travelling on the airplane) will be retained by the passenger or given over to the airline for custody during transportation.

Respondents argue that Mrs. Lippert's carry-on was "baggage" within the meaning of the ticket (Br. in Opp. 5-6), but that is beside the point: unless the "custody" language at issue applies, the limitation on liability is inapplicable regardless of whether the carry-on was baggage. Respondents also appear to argue (Br. in Opp. 7, 9) that any property that is transported on the airplane is covered by the tariff provision if, as will always occur with carry-ons, it was earlier given into the airline's custody at the security checkpoint. This half-explicit argument, which would mean that all carry-on items are covered by the tariff provision at issue, is obviously wrong. The provision explicitly covers carry-on items only "if tendered into the custody" of the airline, thus distinguishing some carry-ons from others and making clear that not all carry-ons are covered: among carry-ons, only those given to a flight attendant after boarding are "tendered into the custody" of the airline, carry-ons retained by the passenger during flight are in the passenger's, not the airline's, custody. Any other reading would, in addition, make the temporary-storage provision utterly superfluous.[2]

Unable to rely on the tariff itself, respondents make several arguments based on their view of federal policy. They first invoke the idea that rates should match the risk assumed. Br. in Opp. 13-14. That idea, however, does not advance the inquiry into what the tariff means,

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[2] Respondents seek support in the two decisions relied on by the Florida Supreme Court. Br. in Opp. 6-8. For the simple reasons set out in the petition (Pet. 19 n.10), however, those decisions offer no such support.

which is not only the question presented but is what *defines* the risk assumed. If the tariff does not limit the risk, then the risk is assumed under normal state-law standards. And, as explained in the petition (Pet. 15-17), federal law demands particular clarity before an airline-drafted tariff may be read to preempt state-law liability.

Respondents also suggest that the Department of Transportation (DOT) has set a public policy allowing disclaimer of liability for "items of high value." Br. in Opp. 14-15 (citing *Complaint against limitation of liability tariffs of Braniff Airways, Inc., and Northwest Airlines, Inc.*, Docket 40373 (Order Dismissing Complaint, Dec. 2, 1987)). The DOT order, however, has nothing to do with the interpretation of the general limit-of-liability provision at issue here. The DOT order addressed a tariff provision that clearly disclaimed liability for jewelry; the DOT's comments about such a provision could have relevance here only if respondents were relying on Delta's comparable provision, but respondents explicitly state that they "never raised" that provision in this case. Br. in Opp. 10 n.7. Beyond that, what the DOT order said—what Delta's jewelry-exclusion provision says—is that passengers, to protect themselves, should keep valuables "in their personal custody." *Complaint, supra,* at 2. The clear implication is that limits of liability do *not* apply when passengers follow that recommended course, as Mrs. Lippert did.[3]

Finally, respondents suggest that the Federal Aviation Act, 49 U.S.C. App. § 1305(a)(1), preempts state common law tort actions relating to the security checkpoint. Br. in Opp. 15-16. That position, however, is plainly incorrect, as its consequences make clear. It would mean that *no* state-law liability could be imposed for negligence —contrary to respondents' consistent position throughout

[3] Of course, solicitation of the Government's views would be a ready way to gain DOT's perspective on the merits and importance of the issue presented.

this litigation that Florida law governs their liability (though not the amount of damages) for the property loss. It would also mean that total immunity from liability would exist regardless of whether any tariff provision addressed the matter—contrary to the regulatory requirement of explicit notice of any liability limit and the regulatory prohibition of limits below $1250. 14 C.F.R. §§ 254.1-254.5.

In short, the Florida Supreme Court's limitation of respondents' liability stands or falls with the proper interpretation of the tariff provision at issue. That interpretation is wrong and important. It should be reviewed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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